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8 NANCY LANOVAZ,
9 Plaintiff,

10 v.
11 TWININGS NORTH AMERICA, INC,
12 Defendant.

13 Case No. 5:12-cv-02646-RMW
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**ORDER DENYING MOTION FOR
RECONSIDERATION**

16 Re: Dkt. No. 180
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This court granted plaintiff Nancy Lanovaz's motion for leave to file a motion for reconsideration of the court's prior order dismissing her unjust enrichment claim as duplicative of her consumer protection claims.¹ Dkt. No. 177 ("Order Granting Leave"). The premise of Lanovaz's motion for leave is that the damages available under her unjust enrichment claim are different from the damages available under her consumer protection claims. Dkt. No. 167 at 5. In the Order Granting Leave, the court raised three concerns related to whether the damages available under the unjust enrichment claim would be duplicative of the damages available under the consumer protection claims. The court requested briefing on those issues because it is apparent that the driving force behind plaintiff's desire to pursue the unjust enrichment claim is so that

¹ The court refers to plaintiff's UCL, FAL, and CLRA claims collectively as the "consumer protection claims."

1 plaintiff can attempt to certify a damages class. *See* Dkt. No. 180 (“Mot.”) at 1 (“Plaintiff should
2 be permitted to pursue monetary remedies under that cause of action [i.e., unjust enrichment].”).
3 Having received the parties’ briefing on the damages available under an unjust enrichment claim,
4 it is now apparent that plaintiff is actually seeking a form of damages that is available, at least
5 theoretically, under *both* an unjust enrichment claim and a consumer protection claim, namely
6 restitutionary disgorgement of profits from Twinings alleged mislabeling. *See* Dkt. Nos. 180
7 (Mot.), 182 (“Opp.”), 183 (“Reply”). Because this form of damages was available under the
8 consumer protection claim, plaintiff should have sought such a remedy when presenting her
9 motion for class certification. She did not. As the court noted in its Order Granting Leave, the
10 court will not allow plaintiff to use the unjust enrichment claim as a vehicle for belatedly
11 obtaining a second bite at class certification, if the damages issues under the unjust enrichment
12 claim are the same as the damages issues under the consumer protection claims on which the court
13 has already ruled. Dkt. No. 177 at 5 n.2. Accordingly, the court DENIES the motion for
14 reconsideration.

15 **I. BACKGROUND**

16 **A. Factual Background**

17 Plaintiff Nancy Lanovaz brings claims on her own behalf and on behalf of a purported
18 class of tea purchasers against Twinings for its allegedly “misbranded” green, black, and white
19 teas. She claims that Twinings’ tea labels and website² violate federal regulations, which
20 California has incorporated into state law, and are misleading. Lanovaz alleges that she paid a
21 premium for Twinings’ green and black tea and would not have purchased them but for Twinings’
22 unlawful labeling. She asserts that Twinings violated California’s Unfair Competition Law
23 (“UCL”), California’s False Advertising Law (“FAL”), and the Consumers Legal Remedies Act
24 (“CLRA”). Dkt. No. 62, Third Amended Complaint (“TAC”) ¶¶ 157-215. Lanovaz seeks

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26 ² The allegedly misleading statements on Twinings’ website have been removed, although the
27 statements at issue still appear on the tea labels.
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ORDER ON RECONSIDERATION OF UNJUST ENRICHMENT CLAIM

1 monetary and injunctive relief for herself and on behalf of a purported class of tea purchasers who
2 bought allegedly mislabeled products. At the heart of Lanovaz's claim is a label describing
3 Twinings' tea as a "Natural Source of Antioxidants," which currently appears on the 51 varieties
4 of Twinings' tea at issue in this lawsuit. Twinings' green teas also include a longer text
5 description on the label, which states in relevant part, "[a] natural source of protective antioxidants
6 . . . Twinings' Green Teas provide a great tasting and healthy tea drinking experience." Dkt. No.
7 70-2 (Stern Decl. Ex. B). Twinings' website also contains statements about antioxidants.

8 Lanovaz began purchasing Twinings' Earl Grey Tea (a black tea) approximately twenty
9 years ago. Lanovaz Depo. 15:4-22, Dkt. Nos. 70-1, 75-1. She began purchasing Twinings' Green
10 Tea six to eight years ago, after a friend told her that it was healthy. *Id.* at 94:12-14, 100:8-13.
11 She also occasionally purchased Twinings' decaffeinated green tea, jasmine green tea, lemon
12 twist, and black tea with lemon. *Id.* at 6:16-19. Lanovaz stopped purchasing Twinings teas on
13 April 30, 2012 when she first met with her attorney. *Id.* at 34:23-36:10.

14 The gravamen of Lanovaz's complaint is that Twinings' labels violate U.S. Food and Drug
15 Administration ("FDA") labeling regulations and thus is illegal under California law, which has
16 adopted these regulations.³ Although no one disputes that Twinings' tea contains flavonoids, a
17 type of antioxidant, the FDA does not allow nutrient content claims about flavonoids because the
18 FDA has not established a recommended daily intake for flavonoids. *See* 21 C.F.R. 101.54(g)(1).
19 Lanovaz argues that Twinings' labels and website are deceptive, misleading, and unlawful even if
20 they are technically true.

21 **B. Procedural Background**

22 Lanovaz filed her first complaint on May 23, 2012, and filed an amended complaint on
23 September 20, 2012. Dkt. Nos. 1, 24. Twinings moved to dismiss the amended complaint, and

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25 ³ California Health & Safety Code section 110100(a) adopts "[a]ll food labeling regulations of the
26 FDA and any amendments to those regulations" and section 110670 provides that "[a]ny food is
27 misbranded if its labeling does not conform with the requirements for nutrient content or health
claims as set forth in Section 403(r) (21 U.S.C. Sec. 343(r)) of the federal act and the regulations
adopted pursuant thereto."

1 the court granted in part and denied in part the motion to dismiss. Dkt. No. 29 (Motion), Dkt. No.
2 46 (Order). The court dismissed Lanovaz's Song-Beverly Consumer Warranty Act, Magnuson-
3 Moss Warranty Act, and unjust enrichment claims with prejudice. Dkt. No. 46 at 12-13. The
4 court dismissed the unjust enrichment claims because "plaintiff's claim for unjust enrichment is
5 based on the same allegations as the UCL, FAL, and CLRA claims. Lanovaz's claim is simply a
6 reformulation of her UCL, FAL, and CLRA claims. Restitution is already a remedy under the
7 UCL, so plaintiff's restitution claim is superfluous." *Id.* at 12. After another motion to dismiss
8 and order, Lanovaz filed the TAC, now the operative complaint in the case. Dkt. No. 62.

9 The parties proceeded with discovery, and Twinings deposed Lanovaz. Immediately after
10 deposing Lanovaz, Twinings moved for summary judgment, in part on the basis that Lanovaz
11 could not show that she materially relied on the antioxidant statements when purchasing Twinings
12 tea. Dkt. No. 69. The court found "a triable issue of fact as to whether or not the label was a
13 'substantial factor, in influencing [Lanovaz's] decision,'" and denied Twinings' motion for
14 summary judgment. *See* Dkt. No. 97 ("MSJ Order") at 8.

15 The case then moved to the class certification stage. The court granted in part and denied
16 in part Lanovaz's motion for class certification. Dkt. Nos. 89 ("Mot. for Cert."); Dkt. No. 132
17 (Cert. Order). The court granted the motion to certify a class for injunctive relief under Rule
18 23(b)(2), and denied the motion as to any damages class under Rule 23(b)(3). The court denied
19 the damages class after finding that "the price premium attributable to the antioxidant labels in the
20 only legally permissible measure of damages," and that "plaintiffs do not present any damages
21 model capable of estimating the price premium attributable to Twinings' antioxidant labels." Cert.
22 Order at 12. Although plaintiff's expert, Dr. Oral Capps, had proposed using a regression analysis
23 that could "be translated into the percentage of sales attributed specifically to the claims made by
24 the Defendant," Dr. Capps later declared that "the use of regression or econometric analysis to
25 assess class-wide or aggregate damages is ruled out" in this case. *Id.* at 11-12 (citing Capps Decl.
26 and Capps Reply Decl.).

1 Plaintiff appealed the court's ruling pursuant to Fed. R. Civ. P. 23(f). Dkt. No. 136. On
2 July 9, 2014 her appeal was declined by the Court of Appeals for the Ninth Circuit. Dkt. No. 140.

3 The court then held a case management conference. In the parties' Joint Case
4 Management Statement, Lanovaz indicated that she intended to file a second motion for class
5 certification based on new discovery. Dkt. No. 144 ("JCMS") at 2-3. Twinings objected to
6 allowing plaintiff to file a second certification motion. *Id.* at 5-8. At the conference, the court
7 granted Lanovaz leave to file a motion for reconsideration of the court's order denying
8 certification of the damages class. Dkt. No. 148. The court ordered plaintiff to "explain what new
9 facts justify the motion for reconsideration; what discovery is necessary to perfect a new motion
10 for class certification[;] and why these issues were not raised previously." Dkt. No. 150.

11 In Lanovaz's motion for reconsideration of the court's certification order, she argued that
12 "[s]ince the time of that declaration [i.e., Dr. Capps' reply declaration], Dr. Capps has come to
13 realize that an econometric model known as hedonic regression analysis may be utilized to obtain
14 an accurate measure of class-wide damages in the absence of a label change." Dkt. No. 155 at 10.
15 The court did not find this persuasive, because Dr. Capps had offered his hedonic regression
16 theory in other cases at the same time as the class certification briefing in this case, and the
17 hedonic regression analysis was not based on "new facts or facts that plaintiff could not
18 reasonably have discovered at the time the original motion was under consideration." Dkt. No.
19 166 ("Order on Damages Recon.") at 4. The court further noted that repeat motions for class
20 certification are not routinely allowed. *Id.* at 2-3.

21 Less than one month after the court denied plaintiff's motion for reconsideration of the
22 damages class, plaintiff filed a motion for leave to file a motion for reconsideration of the court's
23 February 25, 2013 order dismissing her unjust enrichment claim. Dkt. No. 167. Plaintiff argued
24 that (1) unjust enrichment is a stand-alone cause of action under California law, and (2) the
25 remedy of nonrestitutive disgorgement is available under an unjust enrichment claim, but not
26 under a UCL, FAL, or CLRA claim, such that the unjust enrichment claim is not duplicative. The

1 court granted Lanovaz leave to file the motion for reconsideration on the basis that the damages
2 available under the unjust enrichment claim may not be duplicative of the UCL, FAL, and CLRA
3 damages, and directed plaintiff to address the court's concerns regarding nonrestitutionary
4 disgorgement. *See Order Granting Leave.* The court now considers plaintiff's motion for
5 reconsideration of the court's order dismissing the unjust enrichment claim.

6 **II. LEGAL STANDARD**

7 "Reconsideration is appropriate if the district court (1) is presented with newly discovered
8 evidence, (2) committed clear error or the initial decision was manifestly unjust, or (3) if there is
9 an intervening change in controlling law. There may also be other, highly unusual, circumstances
10 warranting reconsideration." *School Dist. No. 1J Multnomah County v. ACandS, Inc.*, 5 F.3d
11 1255, 1263 (9th Cir. 1993) (citations omitted).

12 **III. ANALYSIS**

13 **A. Plaintiff is Seeking Restitutionary Disgorgement of Profits, A Remedy Available Under the Consumer Protection Claims**

14 **1. Plaintiff's Motion for Leave Sought Nonrestitutionary Disgorgement Damages**

15 Plaintiff's motion for leave to file a motion for reconsideration made two arguments: (1)
16 unjust enrichment was a stand-alone claim in California and (2) "the remedy for unjust enrichment
17 can be 'nonrestitutionary disgorgement,'" making the unjust enrichment claim non-duplicative.
18 Dkt. No. 167 at 5. Plaintiff stated that "restitution resulting from an unjust enrichment claim
19 includes nonrestitutionary disgorgement and goes beyond the *restitutionary disgorgement of the*
20 *UCL (or FAL or CLRA)*." *Id.* (emphasis added). Plaintiff also recognized that "[c]ourts have
21 repeatedly held that where the plaintiff got a benefit from a product a total refund of the purchase
22 price would constitute nonrestitutionary disgorgement." Dkt. No. 170 at 9 n.5. Thus,
23 nonrestitutionary disgorgement would be full refunds of the tea price plus the profit Twinings'
24 derived from selling the tea. This court then granted the motion for leave, expressly stating that
25 "plaintiffs are given leave to file a motion for reconsideration because plaintiffs may be able to
26 established that nonrestitutionary disgorgement is an available remedy." Order Granting Leave at

1 2. The court thus concerned itself with whether plaintiff could recover nonrestitutionary
2 disgorgement in this case. *Id.* at 5.

3 **2. Plaintiff's Motion for Reconsideration Establishes that Plaintiff is Actually
4 Seeking Restitutionary Disgorgement, a Remedy Available Under the Consumer
Protective Claims Which Plaintiff Did Not Pursue**

5 Plaintiff's motion for reconsideration abandons the remedy of nonrestitutionary
6 disgorgement and seeks restitutionary disgorgement. Plaintiff devotes her brief to establishing
7 that the court should permit "plaintiff's claim for restitutionary disgorgement." Mot. at 7. Plaintiff
8 herself admits that restitutionary disgorgement is available under the consumer protection statutes:
9 "According to the *Korea Supply*⁴ ruling, a proper remedy under the UCL would be recovery of 'profits
10 unfairly obtained.' Thus, there is no conflict between the disgorgement remedy being considered
11 in this case and the UCL restitution remedy approved in *Korea Supply*." Mot. at 5.

12 Indeed, the cases cited by plaintiff in support of her argument that "disgorgement of
13 profits in an available remedy for unjust enrichment in a consumer protection case" all deal with
14 restitution or restitutionary disgorgement. For example, in *Kosta v. Del Monte Corp.* the court
15 allowed a claim for "Restitution Based on Unjust Enrichment/Quasi-Contract." No. 12-CV-
16 01722-YGR, 2013 WL 2147413, at *14 (N.D. Cal. May 15, 2013). Plaintiff then cites numerous
17 cases that where parties "seeking a disgorgement remedy for unjust enrichment have been allowed
18 to proceed while also asserting claims pursuant to consumer protection statutes." Mot. at 2-3.
19 Plaintiff then cites *Juarez v. Arcadia Financial Ltd.*, 152 Cal. App. 4th 889 (2007). *Juarez*
20 addressed the denial of a motion to compel, and explained that restitutionary disgorgement, or
21 "monies that Arcadia is alleged to have wrongfully collected from the plaintiffs, and any interest
22 Arcadia may have earned on these monies" may be an available remedy under the UCL. *Id.* at
23 917. *FTC v. Lights of America, Inc.*, No. SACV10-01333 JVS, 2013 WL 5230681, at *51 (C.D.
24 Cal. Sept. 17, 2013), and *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 603–04 (9th Cir. 1993), are
25 similarly unhelpful because those cases address damages under Section 5 of the FTC Act, 15

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⁴ *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1149 (2003)
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1 U.S.C. § 45, and not unjust enrichment claims or California consumer protection claims.

2 In sum, none of the cases cited by plaintiff advances the argument that Lanovaz is seeking
3 damages unique to an unjust enrichment claim.⁵ Because plaintiff is actually seeking damages
4 that were available under the consumer protection claims, the court DENIES the motion for
5 reconsideration as the court has already found that plaintiff cannot certify a damages class based
6 on damages theories available under the consumer protection statutes. The court declines to
7 further prolong litigation over plaintiff's ability to certify such a class, given the lengthy
8 procedural history of this case and plaintiff's multiple opportunities to brief the damages issues to
9 the court. *See* Dkt Nos. 89, 114, 155, 160, 167, 170, 180, and 183. Allowing plaintiff yet another
10 bite at class certification—essentially a *fourth* bite (one class certification motion plus two
11 motions for reconsideration)—would be unduly prejudicial to Twinings, highly unusual, and a
12 waste of judicial resources because it is clear that such a motion would be futile.

13 **B. *Astiana* Does Not Require Reinstatement of Plaintiff's Unjust Enrichment Claim In
14 This Case**

15 After the parties' briefing was complete, the Ninth Circuit decided *Astiana v Hain
16 Celestial Group*, No. 12-17596, 2015 WL 1600205 (9th Cir. April 10, 2015). In *Astiana*, the
17 Ninth Circuit held that “[w]hen a plaintiff alleges unjust enrichment, a court may ‘construe the
18 cause of action as a quasi-contract claim seeking restitution.’” *Astiana*, 2015 WL 1600205 at *7
19 (citing *Rutherford Holdings, LLC v. Plaza Del Rey*, 223 Cal. App. 4th 221, 166 (2014)). An
20 allegation that “[defendant] had ‘entic[ed]’ plaintiffs to purchase their products through ‘false and
21 misleading’ labeling, and that [defendant] was ‘unjustly enriched’ as a result . . . is sufficient to
22 state a quasi-contract cause of action.” *Id.* The fact that such a claim is duplicative of other
23 claims “is not grounds for dismissal.” *Id.*⁶ The Ninth Circuit did not directly address what

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25 ⁵ Plaintiff's argument that the remedies available under the consumer protection claims are
cumulative is also irrelevant to whether plaintiff is seeking a unique remedy for unjust enrichment,
or is actually seeking a remedy she could have sought under the consumer protection claims. Mot.
at 4-5.

26 ⁶ The court notes that the Ninth Circuit found that “in California, there is not a standalone cause of
action for ‘unjust enrichment.’” 2015 WL 1600205 at *7.

1 damages would be available under such a claim, but repeatedly referred to restitutary damages.
2 *Id.* (referring to unjust enrichment claims as seeking restitution or “the return of [an unjustly
3 conferred] benefit.”).

4 As explained above, the damages plaintiff now seeks—profits from the mislabeling—are
5 damages available under the consumer protection statutes. Plaintiff admits as much: “According to
6 the *Korea Supply* ruling, a proper remedy under the UCL would be recovery of ‘profits unfairly
7 obtained.’ Thus, there is no conflict between the disgorgement remedy being considered in this case
8 and the UCL restitution remedy approved in *Korea Supply*.” Mot. at 5. Therefore, the court’s
9 dismissal of the unjust enrichment claim (construed as a quasi-contract claim), to the extent such a
10 dismissal was in error in light of *Astiana*, did not limit the remedies plaintiff could have sought at
11 the class certification stage. In other words, plaintiff could have sought certification of a damages
12 class equivalent to a damages class based upon an unjust enrichment claim. Accordingly, there is
13 nothing to be gained by granting the motion for reconsideration, as plaintiff cannot seek
14 certification of a damages class under an unjust enrichment claim in light of the court’s prior
15 Certification Order, which denied certification of a damages class based upon Lanovaz’s
16 consumer protection claims.

17 **IV. ORDER**

18 For the reasons explained above, the court DENIES plaintiffs’ motion for reconsideration.
19 The court sets a Case Management Conference for July 10, 2015 at 10:30 a.m.

20 **IT IS SO ORDERED.**

21 Dated: June 10, 2015



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Ronald M. Whyte
23 United States District Judge